SUPREME COURT, U. S.

FILED

AUG 18 1969

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IN THE

Supreme Court of the United States

LEONARD SIMASKO,
Petitioner,

vs.

TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondents.

No. 479

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

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THE INLAND PRESS, DETROIT, MICHIGAN

In The

Supreme Court of the United States

LEONARD SIMASKO,
Petitioner,

vs.

TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondents.

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

Petitioner, Leonard Simasko, plaintiff below, prays that a Writ of Certiorari issue to review a final decision of the Court of Appeals of the State of Michigan, entered in the above entitled case on January 28, 1969, application or leave to appeal therefrom having been denied by the Supreme Court of Michigan on April 16, 1969, and petitioner's petition for rehearing of its application for leave to appeal having further been denied on May 9, 1969.

OPINIONS BELOW

The Supreme Court of Michigan, in denying petitioner's application for leave to appeal from a decision of the Court of Appeals of the State of Michigan, wrote no opinion. The

opinion of the Court of Appeals for the State of Michigan, rendered on January 28, 1969 is not yet reported in Michigan Appeal Reports or in the Northwest Reports, Second Series. A copy of the denial of petitioner's application for leave to appeal and denial of petitioner's petition for rehearing of its application for leave to appeal and a copy of the opinion of the Court of Appeals for the State of Michigan are appended hereto as Appendices A, B, and C respectively.

Petitioner filed an action to quiet title against a purchaser of delinquent taxes and following a trial in the Circuit Court for The County of Macomb, State of Michigan, a judgment was entered by the Court on December 11, 1967 for the respondents. On January 28, 1969 the Court of Appeals for the State of Michigan in a written opinion affirmed the decision of the trial court. On April 16, 1969, the Supreme Court of the State of Michigan denied petitioner-plaintiff's application for leave to appeal and on May 9, 1969 the Supreme Court of the State of Michigan further denied petitioner-plaintiff's petition for rehearing of application for leave to appeal.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Petitioner in April, 1959, purchased an interest in land owned by Norbert P. Neff, now deceased. Prior to acquiring this interest, however, petitioner's grantor had allowed his property to become encumbered by delinquent taxes. A notice of person claiming interest under tax title (hereinafter referred to as a notice to redeem) was prepared by respondent and served upon petitioner's grantor. The service of this notice was improper and not in accord with the

statute in that it was served by a deputy sheriff outside his jurisdiction. This fact is admitted and herein is where the controversy lies between the parties. Respondent argues that such service although not accomplished according to statute is nonetheless substantial compliance and thus effective. Petitioner argues that according to that part of statute M.C.L.A. 211.140 (Appendix D) dealing with service of the notice to redeem, and the case law of the State of Michigan, that strict compliance as to the service of the notice to redeem must be accomplished to be effective and that to do otherwise is to deny petitioner's right to redeem and hence by intendment a taking of his property without due process of law. Petitioner has steadfastly argued throughout the proceedings in the lower courts that strict compliance with the mandatory provisions of M.C.L.A. 211.140, is the only course authorized by statutory and case law and that a contrary ruling is outside the law and therefore by intendment and clear implication, the thrust of Petitioner's argument has been that his property was taken without due process of law.

The question presented is: Whether substantial compliance as to the service of process of a statutory notice to redeem is sufficient to divest the owner of property of title to the same, and whether such a procedure represents a taking of the owners property without due process of law?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On or about July 17, 1958, one Norbert P. Neff, now deceased, was served with a Notice of Redemption at his residence in Grosse Pointe, Wayne County, Michigan, concerning certain lands and premises he then owned in the

Township of Harrison, County of Macomb, State of Michigan. These lands and premises are the subject matter of this suit.

Service of this notice was accomplished by a Deputy Sheriff of *Macomb County,* and not by a Sheriff of Wayne County, where the landowner resided, as provided by Statute M.C.L.A. 211.140 which states in part:

> ". . . if the grantee or grantees, or the person or persons holding the interest in said lands as aforesaid, shall be residents of any county of the state other than the county in which the land is situated, then such return as to such person shall be made by the sheriff of the county where such person or persons reside or may be found . . ."

Thereafter on January 26, 1959, a tax deed in the name of the respondent was recorded in the County Clerk's office of the County of Macomb.

Norbert P. Neff, thereafter, in April of 1959, sold his interest in said lands and premises on a land contract to the petitioner for the sum of $4,500.00. Petitioner then discovered that Neff had not paid delinquent taxes, which were then owing on said property and in April of 1959 made a tender of payment to the respondent so as to remove any encumbrance as to his title, but that said tender was refused by the respondent because it claimed title to the same lands and premises through its tax deed and by the payment of all delinquent taxes then owing. Whereupon petitioner, on April 15, 1959, deposited with the County Clerk of the County of Macomb all sums necessary for the payment of delinquent taxes.

That prior to the instituting of this suit in Macomb County Court, petitioner labored for several years attempting to remove any cloud or encumbrance upon his title. More specifically, petitioner was in correspondence with

both Mr. Neff, his grantor, and the respondent as to the payment of the back taxes, and it appears from the testimony as rendered in the trial court that Mr. Neff, through his attorney, was attempting to get this matter settled and the title cleared in the summer of 1960, but that during the fall of 1960 Mr. Neff, after an extended illness, expired. It further appears from the testimony and acts that Mr. Neff had devised the property in question to Bon Secour Hospital; therefore, at the close of 1960, three parties were claiming an interest in the property which is the subject matter of this lawsuit; the petitioner, through his land contract with Mr. Neff, Bon Secour Hospital as the devisee of Mr. Neff's Will, and the respondent by and through its tax deed.

Thereafter, the hospital refused to bring suit to quiet title against the township, and the petitioner then attempted to negotiate a settlement with the hospital, asserting his land contract with Mr. Neff; however, a settlement was not reached until May of 1963, and then only after a suit had been instituted against Bon Secour Hospital by the petitioner for specific performance of the contract entered into by Mr. Neff.

Petitioner throughout this time had further correspondence with the respondent asserting his title to said property by and through his land contract with Mr. Neff, and further asserting his quit claim deed from Bon Secour Hospital which was duly recorded in 1964. All such discussions with the respondent proved to be fruitless.

The petitioner then, in 1965 contacted his counsel, L. Edwin Wenger, about the possibility of instituting suit to quiet title and after receiving counsel and advise, the petitioner obtained a title policy from the Burton Abstract and Title Company indicating that title was in the petitioner.

It was then decided that the only course of action to pursue was the instituting of a suit to quiet title against the respondent.

A suit to Quiet Title was instituted in March of 1966. Petitioner's basic contention was that he had a valid title to said lands and premises based upon his land contract from Mr. Neff; and, further, his quit claim deed from Bon Secour Hospital; and that the title of the respondent was materially defective in that the latter did not comply with the mode of service of the Notice of Redemption upon petitioner's grantor as provided in the aforementioned Statute M.C.L.A. 211.140, and as further defined by the case law of the State of Michigan.

Specifically, petitioner averred that the Notice of Redemption which was served upon Mr. Neff was ineffective and void as to Mr. Neff and himself (as Mr. Neff's grantee) because the service was made outside the jurisdiction of the serving officer. Respondent admitted to this fact but argued that the intent of the Statute (M.C.L.A. 211.140) rendered its title valid in that they had *substantially complied* with its provisions. The respondent further contended that laches barred any claim that the petitioner might possess.

Upon trial, the sole issue to be determined by the trial court was whether substantial compliance as to the statutory requirements of a Notice of Redemption is sufficient to pass title to the purchaser of a tax deed. In determining this issue, the court had to consider the sufficiency of the Notice to Redeem upon petitioner's grantor. More specifically, the trial court had to determine whether the service of said notice by a deputy of the County of Macomb upon a resident of the County of Wayne in the County of Wayne was a sufficient service of process according to M.C.L.A. 211.140, which states that the service of said notice to redeem *must*

be served by a sheriff of the county in which such person resides. The trial court, however, did not decide this question; instead, the trial court asserted various cases cited in his opinion that the petitioner not having brought suit contesting the tax sale within the statutory period of one year after the date of sale was quilty of laches so as to bar his action. The cases cited by the lower court are all to be found under another section of our Michigan general property tax law, that being M.C.L.A. 211.70 which states in part:

That no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. *In such cases the owner of such lands may move the court at any time within one year after he shall have notice of such sale to set the same aside, and the court may so order upon such terms as may be just. This ruling was in spite of the fact that it was admitted by the parties at trial that the tax sale was not being attacked in any way, shape or means by the petitioner because of the fact that the validity of the tax sale was never in question, the sole issue being the sufficiency of the Notice to Redeem.* The trial court never decided the issue as to the sufficiency of the Notice to Redeem served upon petitioner's grantor.

This judgment was affirmed by the Court of Appeals again on the basis of the provisions dealing with the tax sale M.C.L.A. 211.70 and not on the basis of an interpretation of M.C.L.A. 211.140 dealing with a Notice to Redeem. Petitioner's Application for Leave to Appeal to the Supreme Court was thereafter denied.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the State of Michigan, whose opinion was tacitly adopted by the Supreme Court of Michi-

gan when it denied petitioner's application for leave to appeal therefrom did not address itself to the issues upon which this petition is based. Instead the appellate court affirmed the decision of the Circuit Court for the County of Macomb, Michigan, on grounds that petitioner was guilty of laches under M.C.L.A. 211.70 in not contesting the tax sale within one year.

Petitioner has charged throughout the proceedings below that the statutory procedure with regard to service of the notice to redeem has not been complied with and as such the usual course prescribed by the state statute has been violated, therefore denying petitioner his property by cutting off his right to redeem.

The Michigan Supreme Court, however, has been unanimous in its decisions dealing with the interpretation of the statute in question to the effect that substantial compliance with the statutory requirements in such matters is not sufficient. *Stockwell* v. *Curtis*, 279 Mich. at 392 (1937).

Also citing:

Littlefield v. *Petnick*, 250 Mich. 437, wherein the Court stated that:

> "Proceedings of this kind are statutory, and the requirements of notice is one step in the proceeding to divest the delinquent taxpayer of his property rights. *Something more than substantial compliance with the statute is necessary.* The provision of the statute must be strictly constructed."

Also citing the language of *Teal Lake Iron Mining Co.* v. *Olds*, 178 Mich. at 238:

> "We think the interests of all concerned will be better conserved by holding that this requirement of the statute is mandatory, and must be strictly observed."

and *McVannel* v. *Pure Oil Co.*, 262 Mich. 518, at 522:

> "The effect of proceedings under the tax law, if valid, is to divest the true owner of the title to his property, and to vest the same in the holder of the tax deed, and such proceedings must be closely scrutinized and strictly construed."

All of these cases however, together with the statutory command of M.C.L.A. 211.140 have been disregarded by the courts below to the effect that petitioner's property, now worth many thousands of dollars, is being taken from him without the safeguards of statutory and case law mandate above cited and to the contrary of petitioner's constitutional rights under the due process and equal protection provisions of the 14th Amendment of the United States Constitution.

In addition to the above cases, petitioner has repeatedly cited *Richeson* v. *Wager,* 287 Mich. 79 (1938). In this case, the plaintiffs successfully contended that the Notice to Redeem served upon the parties, who conveyed their interests to the defendants, was defective in part because the return of service showed that a Notice to Redeem was served on one R. D. Weinberg (defendant's grantor) in Gladwin County, where the property in question was located, *by a deputy sheriff of Genesee County.* Plaintiffs were the heirs of Weinberg and attacked such service contending that it was invalid. The Michigan Supreme Court, in a unanimous decision upheld plaintiff's contention saying:

> "In the case at bar the return of service shows service of notice on Ronald D. Weinberg by a deputy sheriff of Genessee in the County of Gladwin. *Such service being made by a deputy sheriff outside of the jurisdiction where he may lawfully serve such papers is a nullity* and is not in compliance with the requirements of I Comp. Laws 1929, Section 3535 . . ." 287 Mich. at 83. (now MCLA 211.140)

The same reasoning should be applied to the instant case

for here we have almost an identical fact situation with a deputy sheriff of Macomb County making a service upon a resident of Wayne County which is quite clearly outside his jurisdiction and "Such service being outside of the jurisdiction where he may lawfully serve such papers is a nullity and is not in compliance with the requirements of the law."

Petitioner further cites *Turpin* v. *Lemon,* 187 U.S. 51, 23 S. Ct. 20, 47 L. Ed. 70 (1902), wherein petitioner sought to overturn the validity of certain tax deeds. The basis of petitioner's contention was that the return of the sheriff did not show that he had compiled with the procedure set forth by state statute. The Supreme Court in denying petitioner's relief, thereby affirming the decision of the lower court stated:

> *"If the plaintiff had alleged that in proceedings for the sale of these lands the sheriff had failed to comply with the law,* and the defendant had pleaded that by the curative section (25) irregularities not appearing of record would not vitiate the deed, *the constitutionality of that section would properly be raised . . .* (emphasis added)

This language represents the heart of the instant case for in every stage of the proceedings below petitioner herein has continually stated that the service of the notice to redeem was not in accord with the Michigan Statute M.C.L.A 211.140 and case law thereunder but nonetheless all of the judicial minds before whom petitioner has been heard have turned a deaf ear to his plea and as such have effectively taken his property right of redemption away from him without due process of law.

The Court also stated at page 23 of *Turpin* that the 14th Amendment would appear to be satisfied by a showing that *the usual course prescribed by state laws* required notice to

the taxpayer and was in conformity with natural justice. (Emphasis added).

Taking this language we ask ourselves: What then is the usual course prescribed by the state law of Michigan regarding the giving of notice to a taxpayer? Quite simply, M.C.L.A. 211.140 provides that the service of the notice upon the taxpayer be made by a sheriff of the county where such person or persons reside or may be found. This procedure however was not done, as was admitted in the original pleadings, at trial, and as found by both the trial and appellate courts, and therefore, the usual course prescribed by M.C.L.A. 211.140 was never accomplished thus violating petitioner's constitutional rights of due process and equal protection under the 14th Amendment.

Furthermore in all the cases cited by petitioner to the lower courts, the impropriety of the notice to redeem in the several cases cited had the effect of defeating the holder of the tax title, yet under similar facts petitioner in the instant case is treated in a different light. Petitioner asks: Can this uneven-handedness in the administration of justice as codified by the statute and case law of the State of Michigan require a different result from that of previous decisions? If the answer be in the affirmative then clearly there has been a violation of the equal protection provision of the 14th Amendment.

Petitioner also cites *Straus* v. *Foxworth,* 231 U.S. 161, 34 S. Ct. 42, 58 L. Ed. 168 (1913). In *Strauss* as in the present suit petitioner filed an action to quiet title alleging various grounds for setting aside the tax title, stating among other items, that there had not been compliance with the various statutory provisions. To this the Court in answer replied:

"The supreme court of the territory held, in effect,

> that compliance with these statutory provisions was not essential in a constitutional sense to the validity of tax sales, and therefore that the territorial legislature was free to declare that non- compliance should not render the sales invalid; . . ."

Now contrast this with the rulings of the Michigan Supreme Court in *Stockwell* v. *Curtis,* supra; *Littlefield* v. *Petnick,* supra; *Teal Lake Iron Mining Co.* v. *Olds,* supra; *McVannel* v. *Pure Oil Co.,* supra; *Richeson* v. *Wager,* supra, and one thing stands out clearly: That something more than substantial compliance with the statute is necessary. It therefore follows that since in the instant case substantial compliance with the law is all that has been accomplished petitioner has thereby been deprived of his rights to the property in question by having had his right to redeem nullified without due process of law.

Respondent having only substantially complied with the statutory provisions of M.C.L.A. 211.140 in derrogation of the statutory command and case law thereunder, the decision of the Michigan Court of Appeals was clearly erroneous and of the effect of taking petitioner's property away from him in violation of the Constitutional precepts of the due process and equal protection provisions of the 14th Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DR 1-2850

APPENDIX A

L. EDWIN WENGER
THEODORE ANTHONY CARIS
OF COUNSEL

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 16th day of April in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable
THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS G. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Leonard Simasko,
Plaintiff and Appellant
vs. No. 52360
Township of Harrison,
Macomb County,
Defendant

On the order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, for the reasons that plaintiff and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the

State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 16th day of April in the year of our Lord one thousand nine hundred and sixty-nine.

DONALD F. WINTERS, Clerk.

APPENDIX B

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 8th day of May in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable
THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associates Justices

Leonard Simasko,
Plaintiff and Appellant
vs. No. 52360
Township of Harrison,
Defendant

On order of the Court, the petition for rehearing of the order of April 16, 1969, denying leave to appeal is considered, and the petition is DENIED, for the reasons that it is not shown that said order was erroneously entered, and the rules do not provide for such rehearing.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of May in the year of our Lord one thousand nine hundred and sixty-nine.

DONALD F. WINTERS, Clerk.

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS
DIVISION 2

LEONARD SIMASKO,

Plaintiff-Appellant,

v. No. 4913

TOWNSHIP OF HARRISON, MACOMB COUNTY,

Defendant-Appellee.

BEFORE: QUINN, P. J.: McGREGOR and BRENNAN, JJ.

PER CURIAM.

In 1966, plaintiff filed an action to quiet title against defendant, who held a deed under a delinquent tax sale in 1958. The lower court entered a judgment dismissing the complaint and quieting title in the defendant on the basis of laches.

Plaintiff contends that laches did not bar his suit because improper notice of redemption was served on his grantor, according to CL 1948, § 211.140 (Stat Ann 1960 Rev § 7.198). The statute requires service of the notice on the last grantee of record by the sheriff of the county of the grantee's residence or of the county where the grantee may be found. Here, a deputy sheriff of an adjoining county served plaintiff's grantor.

The trial judge did not err by finding plaintiff guilty of laches, thus barring his equitable remedies. Laches, designed to protect future innocent parties from the failure promptly to assert a right, arose after a reasonable time following plaintiff's grantor's notice of the 1958 tax sale. *Aztec Cooper Co.* v. *Auditor General* (1901), 128 Mich. 615; *Cook* v. *Hall* (1900), 123 Mich. 378. Furthermore, a landowner who has notice that his land has been sold for taxes

must have the sale set aside in circuit court within one year thereafter, no matter how he obtained notice. *Odgers* v. *Lentz* (1947), 319 Mich. 502. The lower court correctly determined that plaintiff had notice of the tax sale and that the lengthy delay in filing his action against defendant precluded plaintiff's successful assertion of rights in the property.

Affirmed.

APPENDIX D

M.C.L.A. 211.140 which states in part:

"Provided, that if the grantee or grantees, or the person or persons holding the interest in said lands as aforesaid, shall be residents of any county of the state other than the county in which the land is situated, then such return as to such person shall be made by the sheriff of the county where such persons or persons reside or may be found: . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM 19 69

No. 479

LEONARD SIMASKO,
Petitioner

vs.

TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OBJECTIONS TO THE JURISDICTION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 19....

No. .....

LEONARD SIMASKO,
Petitioner
vs.
TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OBJECTIONS TO THE JURISDICTION FOR WRIT OF CERTIORARI

Respondent, Township of Harrison, files a brief in opposition to petitioner's, Leonard Simasko, petition for a writ of certiorari to review a final decision of the Court of Appeals for the State of Michigan and further in accordance with Rule 24 of the Supreme Court Rules objects to the jurisdiction of this Honorable Court to grant a writ of certiorari to the petitioner.

OPINIONS

In addition to the opinions filed by the petitioner, the decision of the trial judge, the Honorable James E. Spier, Circuit Court Judge of the Macomb Circuit Court, denied petitioner's claim.

Respondent further states that appendices "A", "B", and "C" appended to the writ of certiorari filed by the petitioner and the files and records of the Macomb Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court all consistently show decisions against the petitioner with the Supreme Court of the State of Michigan denying petitioner's application for leave to appeal on April 16, 1969 and petitioner's petition for rehearing of application for leave to appeal on May 9, 1969.

JURISDICTION

Respondent further objects to the jurisdiction of this Honorable Court for issuance of writ of certiorari in that petitioner, Leonard Simasko, has not shown to this Honorable Court the basis for the granting of writ of certiorari as set forth in paragraph 1(b) of Rule 19 of the Supreme Court Rules nor as stated in 28 USC Section 1257(3). Petitioner states the constitutional provision involved is the 14th amendment to the Constitution of the United States claiming a taking of property without due process of law. Respondent submits that petitioner has had a complete hearing of his case and "day in Court" as evidenced by the opinions attached in Petitioner's Appendices "A", "B", and "C". Respondent further represents to this Honorable Court that petitioner has failed to comply with the rules (Rule 23, ¶1(a)) and requirements of this Court in

his request for writ of certiorari by failing to append and file the opinion of the trial court, Macomb County Circuit Court, to his petition. As stated, said opinion by Circuit Judge James E. Spier also denied petitioner's claim.

STATEMENT OF QUESTION INVOLVED WITH RESPECT TO THE MERITS OF THIS MATTER AS HEARD IN THE MICHIGAN COURTS

May a tax deed be collaterally attacked by an action to quiet title, wherein said action was not commenced until more than seven years after the tax title purchaser obtained possession of the property?

The Trial Court and Court of Appeals answered this question, "yes", holding in favor of respondent and against petitioner and the Michigan Supreme Court denied leave to appeal.

STATEMENT OF FACTS

On or about July 17th, 1958, one Norbert P. Neff, now deceased, was served with a delinquent tax notice of redemption at Grosse Pointe, Wayne County, Michigan, concerning certain lands and premises he then owned in the Township of Harrison, County of Macomb and State of Michigan. Service of this notice was made by a Deputy Sheriff of Macomb County and not by the Sheriff of Wayne County as provided by statute. Thereafter in March or April of 1959, Neff sold his interest in said lands and premises to the petitioner herein, and in so doing, conveyed a quit claim deed to said petitioner which was duly recorded at the Registry of Deeds in the County of Macomb, State of Michigan. It should be here noted that petitioner by his own admission stated that he began negotiations with

the said Norbert P. Neff in January of 1959, and at that time, January of 1959, he was aware of the tax title owned by the respondent herein, Township of Harrison. Petitioner further, by his own admission in court, admits to being an attorney for in excess of ten years, and a licensed real estate broker for upwards of ten years.

It should be here noted that petitioner's statement of facts is in error when it recites that petitioner did not learn of the tax deed until April of 1959 after he had purchased the subject premises from Mr. Neff. It is also error that the purchase was for $4,500.00. The land contract recited the amount of $4,500.00, but what was actually paid by Mr. Simasko to Mr. Neff and to the hospital is closer to the sum of $300.00 to $400.00.

In April of 1959 petitioner tendered payment to respondent for the back taxes, and said respondent refused payment, whereupon petitioner deposited same with the Macomb County Clerk. Shortly after the respondent obtained its tax deed it occupied said lands and premises and did exercise acts of dominion and control over the same, including the demolition of a house located on said premises. Respondent further removed the lands from the tax rolls of 1959, as being Township owned property. Petitioner made no effort to occupy the land in question at any time, nor did petitioner seek to pay taxes for the said property after his original tender in 1959. The first attempt by him to obtain possession of the property was the institution of this suit to quiet title in March of 1966, some seven years almost to the day, after allegedly acquiring title from Norbert P. Neff.

Respondent admits that service of the notice of redemption was made by the Sheriff of the wrong county, upon the owner of the property, but all agree that the property

owner did receive notice of the right of redemption and failed to redeem within the statutory period.

Respondent relies on substantial compliance with the statute, for service of the notice of redemption and the further defense that laches bars the petitioner's claim. Because the case was in a court of equity, the two defenses, in effect, merge into one for the reason that substantial compliance and laches are both equitable defenses and are relied upon by the court when an injustice will be served by a strict construction of a statutory law. Such is the case in the instant action and therefore, the respondent admits the erroneous service and the few cases which hold that strict construction of the statute must be observed, but charges the real issue to be the one determined by the trial court. The trial court correctly reasoned that petitioner was guilty of laches in waiting seven years to collaterally attack the tax title owned by the respondent herein.

Petitioner then instituted an appeal to the Court of Appeals where again the Court of Appeals determined that he had notice of the tax sale and that the lengthy delay in filing his action against respondent precluded petitioner's successful assertion of rights in the property and affirmed the opinion and order of the trial court. Petitioner then instituted this appeal to the Michigan Supreme Court and in so doing alleges so-called statements of questions involved which should not properly be before it as petitioner is seeking an equitable remedy, but asks for strict construction of the statutes in such case made and provided. The Michigan Courts correctly determined that the petitioner was guilty of laches and that laches is an equitable defense and as such supersedes the questions alleged by him. Accordingly, respondent will not seek in this brief to argue petitioner's question but will concern itself with the true issue.

ARGUMENT

Briefly we have here a case where an experienced attorney and real estate broker discovered in January of 1959 that the owner of property in Harrison Township, namely Norbert P. Neff, had, on the face of it, lost title to property for non-payment of taxes. This experienced attorney and real estate broker, however, discovered that the wrong sheriff had served notice of redemption upon the property owner. Thus realizing that by a legal technicality the tax deed could be void, he negotiated the purchase of the property from Neff, never, of course, divulging the true facts to the property owner. This is borne out by testimony in the trial court. If Neff had known of the irregularity, there would have been no need for him to try to redeem the property as he would have done just as the petitioner did after he obtained his deed from Neff.

Therefore, we see the petitioner attempting to acquire title at a very nominal value, from a property owner who believed he no longer owned the property.

If the petitioner, in 1959, had instituted this action there could be little room for argument. However, he did nothing and we can only presume that he was waiting to see whether the property was worth while recovering. He sat idly by while the Township of Harrison exercised full ownership over the property and removed the property from the tax rolls. Not until seven years later did he institute this action, when the property had increased from a worth of approximately $4,000.00 to, in his own words, a value of $20,000.00. Keep in mind also, that the total amount expended by him for this property and any other tax sale properties that he acquired from Mr. Neff, amounted to approximately $350.00. In addition, the Township of Harrison spent con-

siderable money clearing the property and filling the low spots with fill dirt acquired from the Highway Department. The Township further entered into a lease to allow the L'Anse Creuse Little League to use the property for a Little League diamond, said lease being for ten years and dated 1965.

Having these facts in mind, may not a court of equity find the petitioner guilty of laches? I believe the answer to this question is "Yes," and our case law bears out the reason for such an answer. The court is directed to the case of *Cook v. Hall,* 123 Mich. 378. This case involved a petition to set aside tax sales, and the case was instituted by the original property owner. Defendant purchased the tax deed in 1897 and plaintiff instituted this action in 1899. The court held that the plaintiff was guilty of laches for waiting two years to try and redeem his taxes. Plaintiff had charged irregularities in the tax sale but the court declined to allow the plaintiff to collaterally attack the tax deeds for the reason that the plaintiff was guilty of laches. The court stated on pages 383 and 384:

> "He attacks only the proceedings leading up to and upon the sale. He knew that his lands were sold, and that some of the defendants had obtained title thereto, and yet chose to rest upon his rights for two years, without taking any steps provided by the law to test the validity of the proceedings. Some of the defendants have meanwhile become interested, not in the land itself but in the timber cut therefrom, and without any knowledge that the petitioner claimed any interest therein. Under such circumstances, equity requires that a party move with promptness to assert his rights, and to protect the interests of those who may become innocent purchasers of the products which may be served. Petitioner has utterly failed to make any showing entitling him to the favor or grace of a court of equity. His present position is one of his own choosing, for which he has no one to blame but himself."

On page 384 the court further quotes from *Campau v. Van Dyke,* 15 Mich. 371:

> "Sound public policy and a just regard for the stability of private rights require that the solemn judgments and decrees of courts, affecting the rights of property, shall not be lightly disturbed, nor, without the strongest reason, allowed to be impeached after any considerable period of time, during which the parties have been allowed to rely upon them, and others may have obtained interests on the faith of them, or the evidence by which they might have been sustained has been lost. And if a party to such judgment or decree might, after any considerable period, impeach its validity without showing a proper excuse or reasonable justification for the delay, * * * a general feeling of insecurity and distrust, very injurious to property and business, must naturally result."

Thus, we have in the *Cook* case, a case decided in 1900, a policy set down on cases involving tax sales. This case has never been reversed nor overruled and is still the law today. The plaintiff Cook, the following year, attempted to reverse the Supreme Court's action by filing an action for mandamus against the Auditor General to cancel the tax deed; and the court in this case, being *Cook v. Auditor General,* 124 Mich. 430, held that the tax deed could not be collaterally attacked.

The Michigan Supreme Court has further required that a land owner who has notice that his land has been sold for taxes and desires to have such sale set aside, must take proceedings therefore within one year. *Farr v. Nordman,* 346 Mich. 266: When a land owner sits idly by after notice of his tax sale, the Supreme Court raises then the defense of laches if prompt action isn't taken by the land owner.

> "The doctrine of laches is founded upon wrong in action to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right."

Epstean v. Mintz, 226 Mich. 660:

> "As quoted in Reed v. Welsch, 358 Mich. 579, and Angeloff v. Smith, 254 Mich. 99."

Where a land owner knows for seven years that petitioner had bought his land from the State and held a tax deed therefor and claimed title to it but made no effort to open the decree until the purchaser petitioned for a writ of assistance, there was held to be such laches as will preclude an attack upon the tax sale decree. *McFarlane v. Simpson,* 153 Mich. 193, headnote no. 4.

Quoting from *Odgers v. Lentz,* 319 Mich. 502 (Macomb County) at page 506,

> "A court held in Hayward v. O'Conner, 145 Mich. 52, and in Shaaf v. O'Conner, 146 Mich. 504:
>
> "When the owner of land has notice—no matter how he obtained that notice—that his land has been sold for taxes, he must, if he desires to have the sale set aside by the Circuit Court, take proceedings within one year."

See also *Palmer v. State Land Office Board,* 304 Mich. 628. As stated in *Pratt v. Corns,* 214 Mich. 390, 395:

> "One who has let his legal remedy be outlawed cannot obtain relief in equity. *Webster v. Gray,* 37 Mich. 37. This doctrine has been frequently announced by this court."

The court is further directed to the case of *Aztec Copper Co. v. Auditor General,* 128 Mich. 615. In this case the court quotes from the learned opinion of the trial judge,

on page 618, wherein the trial judge reviewed the policy of laches and what can be considered a reasonable time to act. On page 619 the opinion reads:

> "It has been held that a decree may be set aside by petition after one year, where the court had no jurisdiction to make it, provided the petitioner shows strong equities in his favor, and was not guilty of laches. * * * This rule is under the general equity practice, independent of the statute above quoted, and hence the questions naturally arise: What is a reasonable time? And was the petitioner guilty of laches in these cases? * * * From above and other cases it also seems clear that parties cannot be guilty of laches until notice of the sale and purchase has become known to the parties, and from that time only can laches be imputed."

It thus becomes clear that Michigan case law provides that a court of equity has the power, based upon the facts, to find laches as a legitimate defense in tax sale cases, and the period of time laches begins to run is the time of the notice of sale and purchase. In the case at bar the petitioner admitted that he had knowledge of the purchase by the respondent in January of 1959. Yet he took no action for more than seven years, during which time the Township expended considerable money for the property leased to third parties and lost revenue from taxes which would normally have been spread. Other losing parties from the taxes would, of course, be the county and the school district. Clearly, the petitioner was waiting for seven years, should be considered laches per se. The *Cook* case, *supra,* was only two years, yet the court found laches. Petitioner's counsel, in his argument, claimed that the petitioner was merely waiting for the former owners to clear title to the property. Is the court to stand by and allow an experienced attorney and real estate broker to use the excuse that he did nothing

because he was waiting for a layman to clear up title to the property? I think not.

Respondent further contends that a court of equity would not and should not allow an interloper such as the respondent, to acquire title to property because of an irregular service. Respondent maintains that the irregular service would be a rightful claim of the property owner (the actual property owner) injured if it was timely asserted, but in this case the actual owner made no effort to enforce his rights. An examination of the cases cited by petitioner bears out the fact that all of the plaintiffs were the actual owners of the property at the time of the tax deed, and were not subsequent purchasers. Clearly, the court is going to protect the property owner from wrongful tax sales, but as has been pointed out in the *Cook* case, *supra,* even the actual property owners, by not acting timely, will be deprived of their property. For the court to allow petitioner to acquire title to the property in question, would be inequity on its face with the petitioner deriving unjust enrichment.

It should be pointed out to the court that petitioner at no time, has offered, in this case, to reimburse the Township of Harrison if the court should find title in the petitioner. That reimbursement must be made, is clear. The *Aztec Copper* case, in syllabus on page 615, recites:

> "A tax sale should not be set aside for defects in the proceedings without requiring the petitioner to reimburse the purchaser."

In the case at bar, because of petitioner's long wait in bringing this action, reimbursement would be most difficult to determine. Although the property has been taken off of the tax rolls, the Supervisor of Harrison Township, to the best of his ability, determined what the assessment would have been for the years 1959 through 1967, and the total taxes

and special assessments would amount to $4,340.23. This amount of course, would have to be divided among the special assessment districts and the Township of Harrison as well as the County of Macomb and the L'Anse Creuse School district. In addition, actual out-of-pocket expenses, including interest, amounted to $1,496.98. This, of course, does not take into account the many thousands of yards of fill obtained by the Township from the other governmental agencies at no cost to the Township, petitioner, of course, if he acquired title, would receive the benefit of this fill.

CONCLUSION

Respondent respectfully prays that this Honorable Court deny petitioner's request for writ of certiorari in that he has failed to comply with the rules of practice of this Court by failing to file and append the opinion of the Macomb County Circuit Court. However, if the petition for writ of certiorari is not denied for this procedural error, Michigan case law clearly allows the defense of laches to be presented in a tax sale case, and petitioner's failure to claim title to his alleged property for a period of seven years, defeats his right to recovery. The trial court and Michigan Court of Appeals correctly held that the petitioner in this cause is guilty of laches such as to bar his right of action in equity. The cases heretofore cited likewise support this contention and respondent respectfully prays that this Honorable Court not grant the petitioner writ of certiorari in that petitioner has not stated a basis for jurisdiction for issuance of writ of certiorari by this Honorable Court and has been afforded due process under the 14th amend-

ment to the Constitution of the United States as shown by the statement of facts and arguments herein.

Respectfully submitted,

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